IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

CLARA I. MAYS, *Petitioner,*

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS, H. P. GUMBRECHT, AGNES B. MULARKEY, MARY C. CARLETON, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is not yet officially reported but is printed in the record filed in this cause (R. 36).

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240(2) of the Judicial Code (28 U. S. Code Sec. 347 (a)).

The date of the judgment in this case is January 29, 1944

(R. 48). Petition for rehearing was filed within the time provided by the Rules of the United States Court of Appeals for the District of Columbia and was denied on February 16, 1945 (R. 49).

STATEMENT OF THE CASE.

The statement of the case and a statement of the salient facts from the record appear in the accompanying petition for certiorari. Any necessary elaboration of the facts will be made in the course of the argument.

ERRORS BELOW RELIED UPON HERE.

In enjoining a Negro from the use and occupancy of her home and in setting aside a conveyance to her solely because of a contract by a remote predecessor in title purporting to prohibit future disposition of that property to or its occupancy by Negroes, the Court of Appeals erred in that:

I. Improper construction and effect have been given to the decision of this Court in Corrigan v. Buckley.

II. Principles controlling equitable discretion have been violated in a matter of large public concern.

III. The judicial arm of government has imposed racial restrictions which may not under the Constitution and laws of the United States be imposed by a legislature.

ARGUMENT.

I.

The Court of Appeals Has Given Improper Construction and Effect to the Decision of This Court in Corrigan v. Buckley.

The decision below and all other cases in this jurisdiction holding that the courts have the power to effectuate racial restrictive covenants are based upon *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 Fed. 899; appeal denied 271 U. S. 323.

In the case at bar, Chief Justice Groner stated:

> * * * "we are unable to find anything in the points we are asked to consider which we have not heretofore considered and decided adversely to appellants' contentions. As long ago as 1924, in the case of Corrigan v. Buckley, 55 App. D. C. 30, 299 Fed. 899, we were called on to decide as to the constitutional validity of an identical covenant, and likewise whether such a covenant should be declared to be against public policy. We held in favor of the validity of the covenant and against the claims that its provisions were contrary to public policy. On appeal to the Supreme Court, it was held that neither the constitutional nor statutory questions relied on as grounds for the appeal had any substance or color of merit, or afforded jurisdictional basis for the appeal * * *".

The concurring opinion by Mr. Justice Miller in the instant case relied upon *Corrigan* v. *Buckley*, and at the same time cast doubt upon the soundness of its conclusions:

> "The Supreme Court and this Court have established the law for the District of Columbia as it is set out in the majority opinion, and we are bound to follow it. The considerations urged by Mr. Justice Edgerton are persuasively presented. If proper weight was not given to them in the earlier decisions and if present-day conditions do not justify the position then taken, it has been within the power of Congress to change the law, during all the intervening years. If judicial reinterpretation of the law is now in order, it is the function of the Supreme Court, as the highest Court of the District of Columbia, so to advise us."

Another typical generalization predicated upon *Corrigan* v. *Buckley* appears in *Hundley* v. *Gorewitz*, 77 App. D. C. 48, 132 F. (2d) 23:

> "* * * it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction. Corrigan v. Buckley, 55 App. D. C. 30, 299 Fed. 899. * * * "

In passing it is noted that almost every state decision dismisses the question in the same uncritical fashion, citing *Corrigan* v. *Buckley* as the leading case.

All of these cases, including the decision below, misconstrue *Corrigan* v. *Buckley*, which was decided in this Court solely on the question of jurisdiction to entertain an appeal under Section 250 of the Judicial Code, and in the Court of Appeals upon the postulation of a fallacy.

The facts in the case of *Corrigan* v. *Buckley* are these: Mrs. Corrigan, a white woman, and Mr. Buckley, a white man, were parties to a restrictive agreement. Mrs. Corrigan subsequently entered into an agreement to sell to Mrs. Curtis, a colored woman. Buckley filed suit in equity for specific performance of the agreement against Mrs. Corrigan. The court entered judgment against Mrs. Corrigan, forbidding her to sell to Mrs. Curtis. The case was appealed to the Supreme Court of the United States under the provisions of Section 250 of the Judicial Code. The Supreme Court dismissed the case for want of jurisdiction in these words:

> "And, while it was further urged in this Court that the decree of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it is likewise lacking in substance.
>
> "It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of Sec. 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this Court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend

its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

"*Hence, without a consideration of these questions, the appeal must be, and is dismissed for want of jurisdiction.*" (Italics added)

So it is crystal clear that this Court did not and could not determine upon the merits of the case, and especially whether these discriminatory covenants were against public policy. Such questions could only be considered if the Court had acquired jurisdiction and had examined the case on its merits. The Court did not consider the question of legal restraint on alienation of land. No question arose concerning a covenant running with the land since the suit was between two parties to a contract. There is not yet any decision of this Court on the merits of these questions, but it is significant that some time later, in the case of *Harmon* v. *Tyler,* 273 U. S. 668, the Supreme Court reversed the judgment of a Louisiana case where the segregation of colored people was attempted by means of powers of sale in deeds and instruments. It is also significant that the Supreme Court of the United States granted certiorari in the case of *Hansberry* v. *Lee,* 311 U. S. 32 when it might have dismissed the case under the rule that ordinary *res adjudicata* is a matter of local law which is left to state courts for their decision. Nevertheless, in *Hansberry* v. *Lee,* the case was reviewed and reversed without remandment.

While the *Corrigan* decision contains an intimation by way of dictum that no substantial constitutional question is presented by the facts of that case, it is to be remembered that this Court was not then committeed to the doctrine that common law determinations of courts can constitute

reviewable violations of the due process clause. But t Court is now committed to that doctrine. *American Feder tion of Labor* v. *Swing*, 312 U. S. 321.

Moreover, the constitutional question urged but not d cided in the Corrigan case, whether due process is denie when a party to a restrictive covenant is prevented fro breaking his promise not to sell to Negroes, is very differ ent from the question here—whether a court denies du process when it makes such an agreement binding on per sons who were strangers to the contract. This was recog nized by Mr. Justice Edgerton, who, in his dissent belo said:

> "It is true than in 1924 in Corrigan v. Buckley, this court restrained a party to a contract like the one be fore us from making a conveyance in violation of his contract. * * * It does not follow that a mere contract like the one before us, against selling land to Negroes, is enforceable against a subsequent owner of the land who has notice of the contract but is not a party to it. Whether it is so enforceable is a question which this court has never had occasion to decide until now. * * * The majority opinion does not and consequently, on analysis, the concurring opinion does not contend that the Supreme Court has determined either the question of particular equities or the question of general policy on which this case turns. If, as the majority say, de cisions of our court have determined these questions adversely to appellants, we should overrule the de cisions. We cannot turn the Supreme Court's power of review into a duty or our duty of reinterpreting the law into a privilege."

Next to be considered is the decision of *Corrigan* v. *Buckley* in the Court of Appeals. Mr. Justice Van Orsdel, speaking for the court, said:

> "* * * The constitutional right of the Negro to ac quire, own, and occupy property does not carry with it the constitutional power to compel sale and convey ance to him of any particular private property. The individual citizen, whether he be black or white, may

refuse to sell or lease his property to any particular individual or class of individuals. *The State alone possesses the power to compel a sale or taking of private property and that only for public use.*" (Italics added) (55 App. D. C. at 31.)

The court had to postulate that hypothetical state of facts and pose a question not in issue to reach its decision. Such a statement is worse than an inverted manner of stating the issues involved; it is utterly without foundation in fact, or reasoning in logic. The use of such devise upon which to base a decision shows how far afield the court had to go and the twisting of facts to achieve a result which is utterly contrary to the plain intent of the Fifth and Fourteenth Amendments, and Sections 1977 and 1978 of the Revised Statutes enacted by the Congress to secure the rights of property to Negroes. There was no question of compelling white persons to sell or rent to Negroes; the question was whether such covenants could be judicially enforced against a party thereto, who despite the covenant wished to sell his property to a Negro.

It must be concluded, therefore, that the issues now before the courts are not decided in *Corrigan* v. *Buckley*, nor is there any significant indication of how they should be decided.

II.

The Decision Below is a Departure From Correct Principles of Equity Jurisprudence in a Matter of Large Public Concern.

A proper exercise of equitable discretion in the light of the anti-social character of the contract here involved and the large actual and potential injury to important public and community interests to be anticipated from the granting of respondents' prayers should have led the courts below to refuse to set aside the conveyances under which petitioner holds title and possession.

A. Applicable Principles of Equity Jurisprudence.

The question of the effect to be given to a racial restrictive agreement purporting to prevent, not only the parties thereto, but their remote successors in title as well, from selling particular land to Negroes lies within the area where equity properly refuses to intervene if an examination of all relevant circumstances, including the position of the parties, the interests of the community and the fundamental policies of the state, shows that the granting of specific redress would be inconsistent with the exercise of sound and reasoned discretion.

A valuable and instructive analogy is presented by those cases in which this Court has concluded that agreements of railroads to maintain certain facilities in a particular place should not be enforced in equity against the contracting railroad or a successor in title. In such a case, *Beasley* v. *Texas & Pacific Ry.*, 191 U. S. 492, 498, Mr. Justice Holmes, speaking for a unanimous court, said:

> "Whether a railroad station shall be built in a certain place is a question involving public interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of what event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand. . . . If it appears that an injunction would be

against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings. . . . The very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone." (at 497, 498.)

The decision in the *Beasley* case was foreshadowed by language in an earlier opinion involving a similar situation, *Texas & Pacific Ry.* v. *Marshall*, 136 U. S. 393, where the Court said:

"But we are further of opinion that if the contract is to be construed as the appellant insists it should be construed (so that the proposed removal of facilities would be a breach) it is not one to be enforced in equity. . . . Both the public convenience and the best interests of the railroad would be sacrificed to a contract which is perpetual . . . It appears to us that if the City of Marshall has under such a contract a remedy for its violation, it is much more consonant with justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and, the railroad be placed at liberty to follow the course which its best interests and those of the public demand. (at 405)

It is petitioner's contention that the present case involves analogous considerations and should be approached by a court of equity in the same way.

B. Controlling Factors of Public Policy Adverse to the Enforcement of Racial Restrictive Covenants.

The following considerations, in application of the foregoing principles to this case, should have been, but were not, given decisive effect by the courts below.

1. The enforcement of racial restrictive contracts in this and in similar cases must actually and potentially cause serious harm to the community by depriving its Negro

citizens of adequate housing and confining them to small and increasingly congested areas to the detriment of their white neighbors as well as themselves. Mr. Justice Holmes' observation that "housing is a necessary of life" (*Block* v. *Hirsh*, 256 U. S. 135, 156 (1921)), states a self evident truth. Equally apparent is the accuracy of the statement quoted by Mr. Justice Edgerton, dissenting in this case, that "Segregation . . . has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to health, morals and general decency of cities, and 'plague spots for race exploitation, friction and riots' ". (R. 42.) The critical overcrowding of Washington and the even more critical overcrowding of the restricted Negro-occupied areas of the city are also notorious facts. Congress has recognized the local situation in the District of Columbia Emergency Rent Act of 1941 (55 Stat. 788) which contains the following legislative finding:

> "It is hereby found that the national emergency and the national-defense program have aggravated the congested situation with regard to housing accommodations existing at the seat of government . . . and are making it increasingly difficult for persons whose duties and obligations require them to live or work in the District of Columbia to obtain such accommodations."

The even greater stricture upon Negroes is illustrated by the evidence in the present case which shows that until petitioner and her family moved into a "white" area, thus precipitating the present suit, they had found it impossible to assemble under one roof and had been forced to live apart from each other in several rooming places. (R. 33.) Further documentation of the dangerous conditions existing in the overcrowded "colored" sections of Washington appears in the margin of Justice Edgerton's dissenting opinion. (R. 45-46.) It is a matter of greatest public concern that the health and safety of the community are

thus being jeopardized and the heavy burden of taxation made even heavier by creating and maintaining breeding places of disease and crime. When a court, as in this case, enforces a racial restrictive covenant and by so doing sanctions any and all similar covenants now existing or to be executed in the future, the discretionary power of equity is being exercised to perpetuate and extend a grave social evil. Such action belies both the name and the historic function of equity.

2. Fundamental national policies expressed in the Constitution and laws of the United States are offended by the contract in the present case. In *Buchanan* v. *Warley*, 245 U. S. 60 (1917) this Court decided that legislation imposing residential segregation upon the Negro deprives the landowner of property without due process of law. When a private contract is specifically enforced by a court so as to impose an equivalent restriction upon persons not party to the contract, government has created a rule of judge-made law equally as effective and equally as objectionable as the legislation condemned in *Buchanan* v. *Warley*. The constitutionality of such judicial action is challenged in a subsequent section of this brief. But even before the issue of constitutionality is reached, it is clear that the constitutional prohibition against legislation must at least reflect national policy against the abuse of the discretionary power of the chancellor to accomplish the same result.

National policy is even more explicitly formulated in Section 42 of Title 8 of the United States Code:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The significance of such legislation upon the exercise of judicial discretion in dealing with contracts inconsistent with public policy, thus authoritatively declared, has been stated by one commentator in the following language:

> " . . . the courts will refuse to enforce a contract, not 'because it is illegal' or because the legislature 'intended that a person making such a contract be punished', but because they have satisfied themselves, in the light of what has been indicated to them by legislative bodies, at home or abroad, the contract is against public policy. . . . the courts should frown upon contracts which, though not touching a penal statute, involve other conduct which has been inveighed against by the legislature. What is suggested is not an extension of the scope of judicial disapprobation of contracts, for at all times the courts have freely declared that non-criminal agreements might be against public policy and consequently unenforcible. *What is urged, again, is merely that legislative judgments should be used as indicators of the occasion for employment of the common law rule governing the validity of contracts.*" (Italics added.) Gelhorn, Contracts and Public Policy (1935) 35 Col. L. Rev. 678, 691-2.

3. Additional equitable considerations arise out of facts not common to all restrictive covenant cases but present here. These will be considered in the immediately following sub-section of this brief, wherein the situation presented by this case is distinguished from those presented by other adjudicated cases, including those relied upon by the majority in the opinion below, in the general field of restrictive covenants.

C. Additional Equitable Consideration in This Case Not Involved in Restrictive Covenant Cases Heretofore Adjudicated and Relied Upon Below.

The courts below have decided that it is proper for a court of equity to set aside a conveyance made to a Negro by a landowner who wishes thus to dispose of his property, solely because some former owner of the estate promised his neighbors that the property would not be sold to Negroes. Such precise statement of the issue is of special importance here because it reveals that this case presents, not only the question whether equity should ever enforce

racial restrictive covenants, but also considerations of equitable consequence favorable to the petitioner which have not been decided by this court, or the courts of the District of Columbia, or any state court of last resort. The situations heretofore adjudicated will be classified and their essential dissimilarity to the present case pointed out.

1. This case is unlike those in which relief has been sought against a covenantor who has broken his promise not to sell to Negroes. Such a breach of contract by a promisor was the matter in issue in the District of Columbia decisions upon which the majority have relied as well as in several state decisions. E.g., *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 Fed. 899, appeal dismissed 271 U. S. 323; *Russell* v. *Wallace*, 58 App. D. C. 357, 30 F. (2d) 981, cert. denied 279 U. S. 871; *Wayt* v. *Patee*, 205 Calif. 46, 269 Pac. 660. Petitioner contends that even in these cases, equity should recognize public policy adverse to such agreements as outweighing the policy of making covenantors generally keep their bargains. But where courts of equity have enforced such agreements, the argument has prevailed that the policy of holding promisors to their bargains was the stronger and controlling policy. Here, however, no one has broken a promise. The considerations of public policy against racial restrictive covenants can be considered and given controlling effect without competition with any countervailing policy.

2. Also distinguishable are the cases which present the issue whether racial restrictive *covenants incorporated in conveyances* may run with the land. E. g.: *Torrey* v. *Wolfes*, 56 App. D. C. 4, 6 F. (2d) 702, also relied upon by the court below. While such covenants in deeds should be denied enforcement in equity for the reasons heretofore stated and applicable to all such covenants, an additional consideration of great importance is presented when an attempt is made to achieve the same result by a simple contract. The practical probability of covenants in deeds

achieving widespread exclusion of Negroes from a community is much less than the danger and likelihood of this result if a simple contract is permitted to run with the land. The normal occasions for conveyances are infrequent and the formal procedures involved are forbidding to the average citizen. But the device of a simple contract or a series of such contracts lends itself to easy and informal restriction of great areas or even an entire community. Pressure of bigoted agitators, the abdication of judgment in the hysteria of a passing period of racial tension, the insistence of one's neighbors that he join with the majority in a neighborhood agreement, all of the psychological factors which lead to capricious and unconsidered mob action, operate effectively to induce the landowner to sign such an agreement. No apparent burden is imposed upon the signer, no substantial change of position is required, no work is entailed. Only the signing of his name on a simple agreement is required. It is surely not the function of equity to make thus easy of accomplishment a restraint on alienation which will bind future owners as well as the unreflecting signer.

3. Decisions involving only restrictions upon use are also to be distinguished from the present restriction upon sale to Negroes. Even where equity has been willing to enforce restrictions on use of land it has not followed that sale might likewise be restricted. Free user is but one incident of ownership. It is substantially less restraint on alienation to cut off this one incident of ownership than to prevent transfer of title itself. Courts sustaining restrictions on use have sharply distinguished such restrictions from restraints on sale. Thus, in *Meade* v. *Dennistone*, 173 Md. 295, 196 Atl. 330, a case upon which the opinion below relies, the court was at pains to make this distinction saying, "the rules against restraints on alienation were only intended to make *conveyancing* free and unrestrained and have nothing to do with use and occupancy" (italics added).

4. The research of counsel has revealed only three cases involving (a) a contract not in a conveyance, (b) restricting sale and ownership and (c) enforced to prevent voluntary sale to a Negro by an owner not party to the contract. One of these, *Lee* v. *Hansberry,* 372 Ill. 369, 24 N. E. (2d) 37, was reversed by this Court (311 U. S. 32) without decision upon the issue here involved. No further proceedings to enforce the covenant in that case appear of record. The second case, that upon which the Illinois decision in *Lee* v. *Hansberry* was predicated, is *Burke* v. *Kleinman,* 277 Ill. App. 519. The records of the Superior Court of Cook County show that the original decree in that case was set aside on it having been revealed that the litigation was fraudulent and collusive.

The third and last decision is *Stewart* v. *Cronan,* 105 Colo. 393, 98 Pac. (2d) 999. However, in that case a Negro purchaser was the moving party seeking affirmative action by a court of equity to quiet his title as clouded by a restrictive contract. The court refused to grant relief. The defendants did not file a cross-bill. Hence, the actual decision is in no way inconsistent with a refusal of equity to act on the petition of a covenantor seeking affirmative relief by way of enforcement of a covenant.

It follows that there is no authoritative precedent in the reported decisions, federal or state, which is not distinguishable from the present situation. Thus, the decision of the court below does not follow any established rule of law. The reluctance of courts to upset settled rules of property law is not a factor in this case. Even the erroneous doctrines under which restrictive covenants have been enforced at times in distinguishable situations have not been applied to upset the titles of Negro landowners in such a case as is now before this Court.

III.

Judicial Enforcement of the Covenant in Question is Violative of the Constitution and Laws of the United States in That the Judiciary Does That Which It Prohibits the Legislature to do, and That It Gives Judicial Sanction to Private Action Which is Criminal Under the Laws of the United States.

When the Government through its courts enforces the type of restrictive covenant herein complained of, it is governmental action proscribed by the Constitution of the United States.

A. The Right to Take and Hold Property is Protected by the Constitution and Laws of the United States.

The right to take and hold property is one of the fundamental and inherent rights and privileges guaranteed by the Constitution of the United States:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several States." Article IV, Sec. 2.
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> " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." Amendment XIV. Sec. 1.
>
> "No person shall * * * be deprived of life, liberty or property without due process of law. * * * ". Amendment V.

While this Court has carefully refrained from attempting to enumerate the several privileges and immunities, it has always recognized the right to acquire, hold, use and dispose of property, both real and personal, as one of those rights. See *Ward* v. *Maryland*, 12 Wall. 418, 430; *The Slaughterhouse Cases*, 16 Wall. 36.

Whether the right to acquire and hold property is a right inherent in state or federal citizenship is beside the point in this case. Whichever it may be, it is guaranteed safety from attack by either the state or federal government under the quoted provisions of the Constitution. See *Buchanan* v. *Warley, supra*; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 37 Fed. (2d) 712, aff'd 281 U. S. 704.

That the bulwark of these constitutional protections is thrown about the residents of the District of Columbia equally with the citizens of the several states is abundantly clear from *Lappin* v. *District of Columbia*, 22 App. D. C., 68, and *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2d) 246. Moreover this Court has repeatedly held that for the purposes of interpretation and application of the provisions of the Constitution, the District of Columbia is to be treated as one of the States of the Union. *Downes* v. *Bidwell*, 182 U. S. 244; *Geofroy* v. *Riggs*, 133 U. S. 258. It follows then that the prohibitions of the Fourteenth Amendment apply to governmental action in and by the District of Columbia. But if there be any doubt of this, the prohibitions of the Fifth Amendment achieve the same result so far as the national government is concerned.

To make certain that there be no misapprehension about the national policy on this important problem, Congress has not been content to rely upon the protection afforded in the basic framework of the Government. Instead, in order to clearly demonstrate the purpose of the people of the United States that there should be no restrictions placed upon the right of a citizen to acquire and hold property, national legislation was enacted, which makes the right of acquisition of property one that is protected by the laws of the United States as well as the Constitution. In 1866, the following provision was enacted:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed

by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property." U. S. Code, Tit. 8, Sec. 42; R. S. 1798."

The constitutionality of this section has never been challenged.

From the foregoing it must, therefore, be inevitably concluded that the right of the petitioner to acquire, hold and use real property in the District of Columbia is an inherent privilege and immunity of her citizenship.

B. The Government Through the Courts Below Has Been the Effective Agent in Depriving the Petitioner of Her Property.

This proposition is the legitimate and logical consequence of the unanimous decision of the Court in *Buchanan* v. *Warley,* 245 U. S. 60. There it was attempted, by legislation in the form of a city ordinance, to forbid colored persons from occupying houses as residences or places of abode, or public assembly, on blocks where the majority of the houses were occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy were reversed, and which based the interdiction upon color and nothing more. Here the judgments of the District Court and the Court of Appeals, District of Columbia have forbidden Consolidated Properties, Inc., from selling to Mrs. Mays, a colored person, and Mrs. Mays from buying a house in the residential district of Washington solely because she is of Negro race or blood, and have permanently enjoined Mrs. Mays from taking title to this property, from using, occupying, or disposing of it. (R. 27)

The question that was to be determined in *Buchanan* v. *Warley* was thus stated by Mr. Justice Day, page 75:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of *property of which occupancy is an incident,* be inhibited by the

State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

In the course of the discussion of this proposition, it was said:

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

After referring to the authorities and statutes cited by him, Mr. Justice Day very appropriately asked—

"In the face of these constitutional and statutory provisions, can a white man be denied consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?" (at 78)

He answered by saying:

"The statute of 1866, originaly passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically re-enacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. Hall v. DeCuir, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (at 78).

The final paragraph of the opinion states the deliberate conclusion of this Court:

> "We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

We have, therefore, the solemn pronouncement of this tribunal that it was not within the legislative power of the State, or any of its instrumentalities, to forbid Consolidated Properties, Inc., from selling the house to Mrs. Mays, or the latter from purchasing and occupying it.

For the reasons considered in *Buchanan* v. *Warley*, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative department to authorize.

But in this case the courts below have gone further. They have not required that parties perform their contracts. They have by judicial action created a rule of property and have made that rule binding upon persons who have not agreed to it. In such circumstances it must be entirely clear that the Government and only the Government is the effective force depriving the petitioner of her property.

We cannot emphasize too strongly that the immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the petitioner has been deprived of liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereign power. It is not Burgess, the respondent, but the sovereignty, which speaks through the court, that has issued a mandate to the petitioner which prevents Consolidated Properties, Inc. from selling, leasing or giving its property to Mrs. Mays, and the latter from acquiring and occupying the property, simply because she is of the Negro race or blood.

In rendering these decrees, the courts which have pronounced them have functioned as the law-making power. It is they who are seeking to effectuate the policy of racial segregation based on color. They have virtually announced to all colored persons: "You shall not inherit, purchase, lease, sell or hold real property for the acquisition of which you have entered into a contract, simply because you are of the Negro race or blood." They have told those of the white race who have entered into a covenant such as is referred to in the decree: "You shall not sell, lease, or give your property to any person of the Negro race or blood." They have practically declared: "If the owners of property in a particular locality, however extensive its area may be, see fit to agree on such a policy of segregation, these courts, sitting in equity, may by their decrees enforce such a policy, even if it be conceded that they would be prohibited from doing so by the decision of the Supreme Court of the United States if the legislative branch of the Government had established a like policy."

To test the incongruity of such a situation, let us suppose that after the decision in *Buchanan* v. *Warley*, the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were

affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review.

Or let us suppose, that after the rendition of these decrees, Consolidated Properties, Inc., standing on its constitutional rights, had executed a deed of the premises here in question to Mrs. Mays, and the latter had proceeded to occupy them. At that point the exercise by the court of its power to enforce its decrees through the medium of contempt proceedings, would be the most extreme form of governmental action employed to enforce the policy of racial segregation based on color, in violation of the letter and spirit of the Constitution as interpreted in *Buchanan* v. *Warley*.

Such inconsistency between legislative and judicial action was the subject of the following comment in *Gandolfo* v. *Hartman*, 49 Fed. 181:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restrictive application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while the State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the Courts may enforce. Such view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other. * * * But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, and in violation of the principles embodied in its Constitution. Such a contract is absolutely void and should not

be enforced in any Court, certainly not in a court of equity of the United States." (at 182, 183)
Compare: *Kennett* v. *Chambers*, 14 How. 38.

Therefore, it is respectfully submitted that the enforcement of these covenants by a court is governmental action, which is prohibited by the Constitution of the United States. It is the enforcement of such covenants by judicial officers which violates the Constitution, not the mere making of the agreement by the private land owners.

C. The Covenant in Question is a Criminal Conspiracy, Unenforceable in the Courts of the United States.

The foregoing argument has demonstrated that the right to acquire, use and occupy land, as well as the right to dispose thereof, is one that is protected by both the Constitution and the laws of the United States. (See: *Buchanan* v. *Warley, supra.*) Congress has protected this right by making it a felonious conspiracy to injure or oppress petitioner in the exercise thereof. Section 51 of Title 18 of the United States Code provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same—they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any place of honor, profit, or trust created by the Constitution or laws of the United States."

There is no doubt that a written agreement, solemnly executed, and recorded as a deed, by a group of property owners to the effect that a person shall be deprived of his constitutional right to acquire and use property solely because of his race and color, is evidence of the highest order that there has been effected, between the signatories thereto a conspiracy to deprive the person affected of a

right secured to him by the Constitution and laws of the United States.

The specific question at bar has been passed upon by a Federal District Court in Arkansas. In the case of *United States* v. *Morris*, 125 Fed. 322, after showing that by virtue of the Thirteenth Amendment, Congress had the power to enact this legislation regarding the acts of individuals, the court proceeded to discuss the validity of an indictment of certain defendants who had conspired to keep Negroes from the right to lease and cultivate private lands. In an elaborate and scholarly review of the history of the Act, the court came to the conclusion that a mere agreement to keep Negroes out of lands was the very type of act prohibited by the legislation, and concluded:

> "That the rights to lease lands—are fundamental rights inherent in every citizen, is indisputable; and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and the laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)" (at 331)

From this argument only one conclusion can be deduced —the covenant in question constitutes a conspiracy to violate the laws and the Constitution of the United States. May a federal court, acting as an arm of the federal government, lend its aid to the enforcement of a criminal agreement to deprive a citizen of one of her privileges or immunities of citizenship? Only one answer can be given to this question, and this Court has unmistakably given that answer, when, speaking through Chief Justice Taney in *Kennett, et al.* v. *Chambers*, 14 How. 38, it said:

> "The question is—whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such to entitle either party to the aid of the courts of justice of the United States to enforce its execution—."

"for as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass—within the scope of their delegated authority—. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. *And if he does so he cannot claim the aid of a court of justice to enforce it;—our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes—.*" (at 49,50) (Italics added)

The position here taken by Chief Justice Taney has never been questioned. In fact, it cannot be questioned except by revolution. The signatories to the covenant at bar are likewise parties to Article IV, and Amendments V and XIV of the Constitution and to Sections 41, 42, Title 8, United States Code and Section 51, Title 18, United States Code. They obviously contradict each other and cannot stand together. The lesser indignity, the private agreement, must yield to the paramount authority of their public compact. Any other conclusion is to say that not only will this Court permit respondents to deny their solemn adherence to the Constitution and laws of the United States, but at the same time give their criminal agreement in violation thereof the sanction of a rule of property.

Speculation is unnecessary. The courts of the United States have already spoken on the matter. It has been unanimously held that conspiracies such as here involved cannot be enforced through the medium of the very agencies designed to protect citizens in their privileges and imunities. The leading case is *Gandolfo* v. *Hartman*, 49 Fed. 181.

There the court held that a *covenant restricting the lease of property to others than those of the Chinese race was:*

> " * * * contrary to public policy of the government, in violation of a principle embodied in its constitution. *Such a contract is absolutely void and should not be enforced in any court—certainly not in a court of equity of the United States.* (Italics added)

The principle announced there has been consistently adhered to. Federal courts have repeatedly refused to enforce contracts which embody provisions violative of our Constitution or laws. See: *Fox* v. *Gardner,* 21 Wall. 475; *The Spartan,* 25 Fed. 44; *Ex Parte Reeves,* 121 Fed. 848; *The Fri,* 154 Fed. 333; *Grossman* v. *Union Trust Co.,* 228 Fed. 610; *Lakos* v. *Saliaris,* 116 Fed. (2d) 440. State courts have taken similar views of the problem. See: *Lee* v. *Boise Development Co.,* 21 Idaho 461, 122 Pac. 851; *Porter et al.* v. *Barrett et al.,* 233 Mich. 373, 206 N. W. 532; L. R. A. 1916B, 1208, 1209; 9 A. L. R. 120, *et seq.* The rules of the common law are too well known to require any citations. Individuals never have had the right of absolute freedom of contract in the sense that judicial recognition and enforcement of their private agreements may be had when such agreements run counter to the general welfare and the public policy of the sovereign. Usurious, gambling, immoral contracts ar all illustrative of the principle that the courts will not lend their aid to the enforcement of such agreements.

As is said in *Ex parte Reeves, supra,* to enforce the rights contended for here by the respondents would be to allow the very guardian of our liberties to do that indirectly which they have in solemn form and under highest sanction sworn they would not do directly. The jewel of consistency may not be so tarnished—at least not at the hands of a Federal Court sitting in equity. The right here asserted by petitioner is not hers alone—it is the right of Americans—to preserve the fundamental liberties of all against the tyranny of a temporary majority. Jones, J.,

foresaw this in *Ex parte Reeves, supra,* when he said: (at 856)

> "Is it only the claim of a private individual which is here involved?—The principle here involved affects the rights of millions of parents in this land. The matter is one of highest public concern, in comparison with which the insignificance of the individual or his inconvenience sinks out of sight. Who determines what is to "the interest of the public? What are the souces to which we may resort to ascertain what is public policy, and what it requires?" Assuredly, only the will of the people, as declared in the law of the land."

CONCLUSION.

Wherefore, it is respectfuly submitted that writ of certiorari should issue from this Court to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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